

violations under section 13385(i), however, because a mandatory penalty would already be required under section 13385(h).

Section 13385(i) provides that the requirement to assess a mandatory penalty does not apply to the first three violations in a period of six consecutive months, but the statute does not provide any direction for determining which violation(s) occurred first where there are both serious violations and nonserious violations on the same day. In this situation, the total amount of the penalty may vary depending on whether the serious violation is counted before or after the nonserious violation. If a nonserious violation is counted as one of the first three violations it will not receive a mandatory penalty, but a serious violation will always receive a mandatory penalty whether or not it is one of the first three violations. Therefore, when it is not possible to determine the order in which the violations occurred, the recommended conservative approach is to count the serious violations last in determining the order in which multiple violations on the same day occurred.

Attached to this Q&A are several examples for calculating the amount of mandatory minimum penalties.

35. Q. Should the State or Regional Board consider that a violation occurs each day beginning on the date of sampling until receipt of the sampling results?

- A. Typically, sampling data would only indicate whether there is a violation on the date the data is collected. Other evidence, however, may be used to demonstrate that violations occurred on more than one day.

36. Q. If there is a single operational upset that results in simultaneous exceedances of more than one effluent limitation, should the State or Regional Board consider that one violation or multiple violations?

- A. Section 13385(f) states that a single operational upset that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation. Section 13385(f) applies to determining penalties under section 13385(h) and (i). Therefore, for purposes of section 13385(h) and (i), simultaneous exceedances of more than one effluent limitation due to a single operational upset would be considered one violation. Section 13385(f) is the same as Clean Water Act section 309(c)(5) (33 U.S.C. section 1319(c)(5)), and must be interpreted consistent with federal law. For purposes of that provision, U.S. EPA defines "single operational upset" as

"an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operational upset does not include . . . noncompliance to the extent caused by improperly designed or

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37. Q. If the waste discharge requirements contain effluent limitations addressing both a daily maximum and a monthly average for the same pollutant, are exceedances of each based on the same monitoring event(s) counted as two separate violations for purposes of section 13385(h) or (i)?

A. Yes.

38. Q. In determining the number of violations for purposes of section 13385(h) or (i), should the State or Regional Board count one violation for each separate limitation regardless of the number of violations?

A. Unless multiple violations are the result of a single operational upset, each exceedance of separate effluent limitations should be considered a separate violation. However, a violation that fits into more than one subdivision of section 13385 should not be assessed a double penalty. For example, a serious violation under section 13385(h) would also be an exceedance of an effluent limitation under section 13385(i)(1), but penalties should not be assessed twice for the same violation. If the discharger had exceeded four effluent limitations in a period of six consecutive months, and the first and fourth violations were serious violations, the discharger would be assessed a mandatory minimum penalty of \$6,000, not \$9,000. The second serious violation is also the first violation subject to a mandatory minimum penalty under section 13385(i)(1), but the discharger would only be assessed once for that violation.

39. Q. How does the State or Regional Board determine how many "violations" occurred?

A. For purposes of the mandatory penalty provisions, the Regional Board should determine the number of violations based on monitoring data and other evidence that the discharger has exceeded an effluent limitation. For example, if based on one or more monitoring data points in a month, the Regional Board determines that the discharger has violated a monthly average effluent limitation, the Regional Board should consider that one violation. Note, however that if the Regional Board chooses to assess discretionary administrative civil liability for violations of a monthly average it should consider such a violation of a monthly average as 30 days of violations in order to be consistent with the Clean Water Act. The new section 13385(h) and (i) requires a mandatory penalty for "each violation," not "for each day in which the violation occurs" as provided in section 13385(c). If the permit contains an effluent limitation based on a daily maximum, but only requires weekly monitoring, the Regional Board should consider each monitoring data point that exceeds the daily maximum as a violation unless other evidence indicates that a violation has occurred on more days than the day the monitoring data was collected.

40. Q. Does an exceedance of an average or median effluent limitation constitute one violation or multiple violations?

A. In the usual case, if the discharger exceeds an average or median effluent limitation based on a static period of time (e.g., monthly or weekly averages), it would be considered only

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one violation for the month or the week for the purposes of calculating mandatory penalties, as described above. Exceedances of effluent limitations where it is specified that the average or median will be computed on a rolling basis (calculated daily), however, would be considered to be violations for each new time period that the average or median was exceeded. The permit, the applicable water quality control plan, and U.S. EPA guidance should be reviewed to determine how to calculate the number of violations in these cases.

41. Q. Is it possible to have more than one mandatory penalty per day for an exceedance of a single effluent limitation?

- A. For the purpose of mandatory penalties, an exceedance of a single effluent limitation based on instantaneous maximums or hourly averages should be counted as no more than one violation per day.

C. Potential Exceptions to Mandatory Penalties

42. Q. Do the mandatory minimum penalty provisions apply even if the Regional Board has issued a cease and desist order or other order providing a time schedule for achieving compliance with the effluent limitation that is the subject of the violations?

- A. Generally, yes. Issuance of the penalty and the amount of the penalty is mandatory even if there is a cease and desist order or other time schedule order outside of the permit, unless the cease and desist order or time schedule order meet the conditions specified in section 13385(j)(2) or (3), which are discussed below. If, however, the permit itself includes a time schedule before the effluent limitation is in effect, and/or provides for an interim limitation, an exceedance of the effluent limitation that is not yet in effect would not result in a violation subject to a mandatory penalty. If the permit itself includes interim effluent limitations, violations of those interim limitations would be subject to mandatory penalties. If a cease and desist order includes effluent limitations, violations of those effluent limitations would not be subject to mandatory penalties unless those limits are also in the permit. The Regional Board may also under some circumstances grant variances from effluent limitations; such variances would be contained in the permit and if they are effluent limitations, violations could be subject to the mandatory penalties.

43. Q. Are exceedances of effluent limitations that result from qualifying treatment plant bypasses or upsets subject to mandatory penalties?

- A. Generally, yes. The only exception, which is specified in section 13385(j)(1)(D), applies to treatment facilities located in Los Angeles County. Pursuant to 40 CFR section 122.41(m) and (n), a Regional Board may incorporate provisions for bypass and/or upset into its NPDES permits. (Note that the "upset" described in 40 CFR 122.41(n) is not the same as the "single operational upset" described above.) If the discharger's permit contains these provisions, then for the purposes of assessing discretionary liability, violations of certain effluent limitations may be excused if the discharger can demonstrate